

Decision **DRAFT DECISION OF ALJ YACKNIN** (Mailed 3/30/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Order Instituting Investigation and Order to Show Cause on the Commission's own motion into the operations and practices of Warner Lee Fischer, an individual, Pacific Coast Moving & Storage, Inc., a Nevada corporation, its president, Warner Lee Fischer, and its Vice President, Philip Edward Dresser, Jr.

Investigation 04-08-021
(Filed August 19, 2004)

OPINION DENYING APPLICATION AND IMPOSING SANCTIONS

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OPINION DENYING APPLICATION AND IMPOSING SANCTIONS

Summary

This decision denies with prejudice the pending application of the respondents for a household goods carrier permit, imposes a fine of \$40,000, and orders restitution to customers and compensation to the Commission for the costs of investigation.

Background

A. License and Enforcement History

On September 4, 2002, Warner Lee Fischer filed an application to transfer the household goods permit issued to Yair, Inc., to Fischer as an individual. Fischer subsequently amended the application to name Pacific Coast Moving & Storage, Inc. (Pacific) as the transferee, and listing Fischer as president and Philip Edward Dresser, Jr. as vice president.

Staff orally informed Pacific on three separate occasions during the month of October 2002 that it is not permitted to operate until the Commission approves its household goods permit application, and that the application was lacking evidence of public liability, cargo, and workers' compensation insurance coverage and successful completion of the Maximum Rate Tariff 4 household goods exam.

Staff met with Pacific on November 1, 2002, at which time Pacific represented that it had performed 95 local moves over the months of September and October 2002. By letter dated November 6, 2002, staff formally instructed Pacific to cease and desist from all operations as a household goods carrier. On March 13, 2003, the License Section denied the transfer application for failure to file evidence of public liability, cargo, and workers' compensation insurance, and to supply other required documents.

By application dated March 28, 2003, Pacific re-applied for a household goods permit. License Section denied this application on July 14, 2003, for failure to file evidence of workers' compensation insurance.

On October 28, 2003, Pacific filed a third application for household goods carrier permit. That application is pending.

Meanwhile, on October 8, 2003, the Commission filed a criminal complaint against Pacific (Los Angeles Superior Court Case No. 3CR02738). The Commission alleged 14 misdemeanor violations of the Public Utilities Code related to moves conducted between June and November 7, 2002. In addition, the Commission alleged that Pacific had committed theft and grand theft with respect to two moves conducted on June 30 and July 29, 2003. On January 12, 2004, the court sentenced Fischer to serve 90 days in the county jail or perform 45 days of work for the California Department of Transportation, and ordered restitution payments.

As the criminal matter was proceeding, on October 30, 2003, the Commission filed a complaint against Pacific (Los Angeles Superior Court Case No. BC305150) seeking a temporary restraining order, preliminary injunction, permanent injunction, and recovery of civil penalties. In support of its complaint, the Commission offered evidence that Pacific operated without a household goods carrier permit, specifically by reference to the moves conducted from June through November 7, 2002.¹ The superior court issued a temporary

¹ Although they refer to moves conducted over the same time period, not all moves identified in the criminal complaint are referenced in the civil complaint, and vice versa.

restraining order on November 3, and a preliminary injunction on December 5, 2003, enjoining Pacific from operating as a household goods carrier until such time it is granted a permit by the Commission.

B. Objectives of the Order Instituting Investigation

In the order initiating this proceeding, the Commission directed the respondents to appear and show cause why the pending application for a household goods carrier permit should not be denied for cause and lack of fitness. The Commission also stated that fines and other sanctions might be imposed for the unauthorized operations and violations of statutes and rules.

C. Prehearing Conference and Scoping Memo

On November 9, 2004, the assigned Administrative Law Judge (ALJ) convened a prehearing conference (PHC), as was noticed by ruling dated October 21, 2004. The respondents did not appear.

On November 16, 2004, the Assigned Commissioner and ALJ issued a scoping memo setting a schedule for staff's submission of additional evidence and its brief. The scoping memo provided that respondents may seek leave to serve responsive testimony upon a showing of good cause why they did not appear at the PHC. Respondents did not file any such motion. Accordingly, the matter was submitted on the filing of staff's brief on January 28, 2005.

D. Burden of Proof

Notwithstanding respondents' failure to appear, staff bears the burden of proving its allegations.

Staff's Position

Staff presented seven exhibits for the formal record in this proceeding.²

Relying on this evidence, staff's brief charges the respondents with the following violations:

1. 18 violations of the Pub. Util. Code § 5133 by operating as a household goods carrier without a permit in force;
2. 7 violations of § 5314.5 by advertising and holding themselves out as a household goods carrier without a permit in force;
3. 17 violations of § 5315.5 by failing to procure and maintain on file workers' compensation insurance coverage for its employees;
4. 12 violations of § 5161 by failing to procure and maintain on file liability insurance;
5. 7 violations of § 5161 by failing to procure and maintain on file cargo insurance; and
6. 28 violations of the Commission's Maximum Rate Tariff 4 (MAX 4) as follows:
 - 7 violations of Item 88 for failure to furnish to each prospective shipper a copy of the "Important Information Booklet For Persons Moving Household Goods;" and
 - 6 violations of Item 108 for charging in excess of the written estimate quoted to customers absence a valid change order;
 - 6 violations of Item 120 for failure to obtain a change order for additional services;
 - 3 violations of Item 28 for failure to provide a complete "Agreement for Moving Services" to all shippers; and

² The exhibits were served on the respondents, and staff included a proposed list of its exhibits in its brief. These exhibits will be accepted for the record.

- 6 violations of Item 132 for failure to provide a “Not to Exceed Price” statement on shipping documents.

In addition, based on these violations, respondents’ failure to refund overcharges to shippers, and respondents’ failure to disclose Fischer’s prior criminal convictions, staff concludes that these respondents are unfit under § 5135 to operate as household goods carrier.

Staff recommends that the Commission impose a fine of \$40,000, order restitution in the amount of \$4,425.40, and order respondents to pay any outstanding court judgments based on loss and damage claims. Although staff does not explicitly ask the Commission to assess costs against respondents, staff points out that the Commission has the authority to do so, and identifies its costs as \$6,931.83. Finally, staff recommends that the Commission deny respondents’ pending application for a household goods carrier permit for cause and with prejudice.

Discussion

A. Operating Without A Permit

Section 5133 prohibits household goods carriers from engaging or attempting to engage in the business of household goods transportation without a permit issued by the Commission. As set out above, Pacific has yet to be issued a household goods carrier permit; Pacific’s first two applications were denied, and its third application is pending. Thus Pacific has never held operating authority from this Commission.

Staff alleges 18 violations of § 5133. Staff does not discuss the evidence in its brief or identify the 18 violations it alleges, but simply refers to the declaration of Michael W. Nakasone as evidence of 11 of the 18 violations, and to the declarations of Adrienne Johnson, Dennis Fried, Randall Hew, and shippers Frank and Coil as evidence of the remaining seven violations.

We extrapolate the following relevant facts from among the referenced material:

- Pacific told staff that it made 95 local moves over the months of September and October 2002, during which time it did not have a household goods carrier permit.
- Pacific's completed job listings indicate 99 moves for September and October 2002, corroborating Pacific's statement.
- Staff reviewed shipping documents related to 87 moves, and presented eight sample sets of the documents it reviewed. The eight sets of sample documents relate to moves conducted in September and October 2002. We conservatively assume that all 87 freight bills reviewed relate to moves conducted in this same period.
- The declaration of shipper Madeleine Kolodziej further corroborates one of the eight moves represented by the shipping documents, and documents an additional move conducted in October 2002.
- The declaration of shipper Virginia McLaughlin provides evidence that Pacific moved her household goods on November 7, 2002.
- Staff identified nine intrastate moves performed by Pacific by searching complaints filed against Pacific with the Better Business Bureau between September 2002 and January 2003. Staff determined that three of the moves were performed in June 2002. Shipper declarations indicate that one move was performed in September 2002, and two moves were performed in July and August 2002. The record is silent with respect to the dates of the remaining three moves.
- The declaration of shipper Jennifer Ardy provides evidence that Pacific conducted a move into storage on June 20, 2003, and out of storage on July 29, 2003.
- The Johnson and Hew declarations document two sting calls to Pacific, on November 18, 2003, and on

June 22, 2004. In both of these calls, staff inquired about obtaining an estimate for a household goods move. In both of these calls, Pacific held itself out as a carrier offering to conduct the move.

- The Fried declaration documents that in May 2004, Pacific contacted and solicited the named contact for a property, listed for sale in the Multi Regional Multiple Listing Service, Inc., database, for a move.
- The declarations of shippers Frank and Coil document four additional moves by Pacific on July 15 and September 16, 2003, and on July 2 and October 29, 2003.

We find that Pacific violated § 5133 by performing at least 99 household goods moves and making at least three attempts to perform household goods moves without a permit.

B. Advertising Without A Permit

Section 5314.5 prohibits household goods carriers from engaging or attempting to engage in the business of household goods transportation without a permit issued by the Commission. Staff alleges seven violations of § 5314.5, and provides evidence of one instance of an advertisement for Pacific in the SBC Yellow Pages directory, Simi Valley-Moor Park edition, five instances of advertising flyers or postcards mailed directly to shippers, and one instance of an escrow company providing Pacific's phone number to a shipper.³ However,

³ Although the order instituting investigation tallies 88 alleged violations of the prohibition against advertising without a permit based on the number of days that Pacific advertised its services, staff in its brief appears to tally the violations, and references record evidence for them, based on the number of advertisements, flyers and direct solicitations. We accept staff's approach in brief, and address its allegations accordingly.

there is no record evidence that Pacific was responsible for the escrow company providing its phone number to the shipper.

We find six violations of § 5314.5 by advertising in the SBC Yellow Pages directory and by mailing flyers or postcards to shippers.

C. Operating Without Worker's Compensation Coverage

Section 5135.5 requires every household goods carrier to file with the Commission evidence of workers' compensation coverage for its employees, a certificate of self-insurance, or a statement that it does not employ any person in a manner that subjects it to the workers' compensation laws.

Staff alleges 17 violations of § 5135.5 and, in support of this allegation, identifies 17 moves performed by Pacific.⁴ Commission records and Pacific's own acknowledgement confirm that Pacific never provided evidence of workers' compensation coverage to the Commission. However, the record raises factual and legal questions regarding whether Pacific employs any person in a manner that subjects it to the workers' compensation laws.

According to a staff note to the file, Pacific told staff that its employees, other than office employees, are part owners of the company and that Pacific is therefore not required to maintain workers' compensation coverage. The note indicates that the staff person offered Pacific his understanding that only officers may opt out of coverage, and recommended that Pacific contact an attorney on

⁴ Although the order instituting investigation tallies 847 violations of the requirement to maintain evidence of liability, cargo and workers' compensation insurance on file with the Commission, staff in its brief appears to tally the violations, and references record evidence for them, based on moves performed without insurance. We accept staff's approach in brief, and address its allegations accordingly.

the matter. Staff offers no other evidence or legal analysis of the validity of Pacific's claim that it is not subject to the workers' compensation laws.

We find that staff has not met its burden of proving that Pacific is subject to the workers' compensation laws.

D. Operating Without Liability Protection

Section 5161(a) requires household goods carriers to maintain protection against liability for the payment of damages for personal bodily injuries.

Staff alleges 12 violations of § 5161(a) and, in support of this allegation, identifies 12 moves performed by Pacific.⁵ Staff does not describe how it arrived at its tally of violations. However, the record contains a certificate of insurance and a notice of cancellation of insurance indicating that Pacific had liability protection in effect from June 5 through October 20, 2003. The 12 moves identified by staff occurred outside of this period. We identify two additional moves for shippers McLaughlin and Levi that were performed outside of the covered period, and that staff did not include in its tally.

We find that Pacific violated § 5161(a) by failing to maintain liability protection while performing 14 moves as a household goods carrier.

E. Operating Without Cargo Insurance

Section 5161(c) requires household goods carriers to maintain cargo insurance.

⁵ Staff includes in its tally a move for shipper Frank, and does not include any moves for shipper Coil; however, it appears that a move for shipper Coil, and none for shipper Frank, was performed during the period without liability protection.

Staff alleges seven violations of § 5161(c) and, in support of this allegation, identifies seven moves performed by Pacific. Staff does not describe how it arrived at its tally. However, the record contains a certificate of cargo insurance and a notice of cancellation of cargo insurance indicating that Pacific had cargo insurance in effect from September 25, 2002, through May 20, 2003. The seven moves identified by staff occurred outside of this period. We identify three additional moves, two for shipper Ardy and one for shipper Frank or Coil, that were performed outside of the covered period, and that staff did not include in its tally.⁶

We find that Pacific violated § 5161(c) by failing to maintain cargo insurance while performing at least 10 moves as a household goods carrier.

F. Maximum Rate Tariff 4 Violations

The MAX 4 sets forth rules for the performance of household goods carrier services.

1. “Important Information Booklet”

Staff alleges seven violations of Item 88 of MAX 4, which requires carriers to furnish, to each prospective shipper, a copy of the information contained in the “Important Information Booklet For Persons Moving Household Goods.” Staff does not discuss these allegations beyond referring generally to the record evidence regarding shippers Shirley, Snader, Holeman, Smith, Elbaum, Glaudo, and Stover.

⁶ Three of the moves staff identifies were for shippers Coil and Frank, for whom Pacific conducted two moves each. However, it appears that all four of the moves occurred during the period without cargo insurance.

Shippers Shirley and Snader both state that Pacific did not provide them with the “Important Information Booklet.” Accordingly, we find that Pacific violated Item 88 on two occasions.

We cannot find on the basis of this record that Pacific failed to provide a copy of the booklet to the five other named shippers. Staff does not discuss the record evidence of these alleged violations, and so we are left to speculate as to the basis for them. We observe that Pacific’s freight bills include a notice that the carrier is required to ensure that the shipper has received the “Important Information Booklet,” and a place marked for the shipper to initial and date the freight bill to acknowledge having received a copy of the booklet. We also observe that the freight bills for shippers Holeman, Smith, Elbaum, Glaudo, and Stover do not contain their initials acknowledging receipt of the booklet. This is not, however, conclusive evidence that Pacific failed to provide the booklet; it only proves that the shippers failed to acknowledge its receipt.

2. Charges in Excess of Written Estimate

Staff alleges six violations of Item 108 of MAX 4, for charging in excess of the amount shown on a written estimate unless there is a valid change order. Staff does not discuss these allegations beyond referring to the record for evidence regarding shippers Kolodziej, Lorencz, Shirley, Snader, Frank, and Coil as evidence of these violations.

Shipper Kolodziej states that Pacific provided her a written estimate of \$1,627 for the move, but charged her \$3,277. The written estimate and the shipping agreement contained in the record corroborate her statement. Although Kolodziej states that she does not dispute the \$375 storage charge included in the \$3,277 paid to Pacific, and it appears that this service is not included in the written estimate, this amount does not fully account for the

discrepancy between the written estimate and the final charge. Kolodjiez states that Pacific did not issue a change order, and nothing in the record suggests that Pacific provided additional services beyond storage to account for this additional charge. To the contrary, according to a letter from Pacific to staff, Pacific disputes the overcharge claim on the basis that it reflects the actual hours worked by its movers. This is not a valid basis for charging in excess of a written estimate. We find that Pacific overcharged shipper Kolodjiez \$1,275 in violation of Item 108.

Shipper Lorencz states that Pacific gave him an estimate of \$2,800 “for the entire move,” but, upon arrival to conduct the move, charged him an additional \$200 for packing. Lorencz’s declaration indicates that the estimate was oral, not a written estimate pursuant to Item 108. However, because Pacific also failed to provide Lorencz with a shipping agreement pursuant to Item 128 as discussed below, we count this as an illegal overcharge in violation of Item 108.

Shipper Shirley states that Pacific gave him a written estimate of \$1,182, but upon delivery charged him \$2,300 “due to excess packaging fees and extra man-hours.” The written estimate does not appear to be in the record. Nevertheless, the timing and explanation for the excess charges provides persuasive evidence that Pacific charged Shirley in excess of a written estimate. We find that Pacific overcharged shipper Shirley in violation of Item 108.

Shipper Snader states that Pacific gave her a written estimate, but describes it as being “for eight to nine hours with one truck and three men at a rate of \$95 an hour.” The written estimate is not included in the record, and the description of charges appears to be more of a rate quotation than an estimate for total charges pursuant to Item 108. However, because Pacific also failed to

provide Snader with a shipping agreement pursuant to Item 128 as discussed below, we count this as an illegal overcharge in violation of Item 108.

Shipper Frank's statement that Pacific provided him a written estimate of \$2,122.60 is corroborated by the written estimate contained in the record. Frank states in his declaration that Pacific charged him \$620.40 in excess of the written estimate. It is unclear, however, whether Pacific provided a valid change order that accounted for that discrepancy. First of all, Frank states in his declaration that he seeks only \$267 as justifiable restitution for the overcharges. Second, Frank's moving questionnaire/complaint attached to the declaration states that Pacific charged only \$267 more than the written estimate, and \$76 more than the Not to Exceed Price. The shipping documents do not show a total amount charged to corroborate any of these figures. Finally, although it is partially illegible, the shipping agreement shows an amount of at least \$224 as "Total Charges on Change Order." In view of this evidence, we do not find that Pacific charged shipper Frank in excess of the written estimate in violation of Item 108.

According to shipper Coil's declaration, Pacific provided her a written estimate of \$945 and a Not to Exceed Price of \$1,039, and charged her \$1945 for the total cost of the move. However, Coil does not assert in her declaration that Pacific overcharged her, and her moving questionnaire and complaint attached to the declaration states that Pacific did not overcharge her. The estimated cost of services form attached to Coil's declaration reflects the \$1,039 Not to Exceed Price, and appears to include storage, but not packing, costs. The shipping agreement attached to the declaration likewise reflects the \$1,039 Not to Exceed Price, and indicates an additional charge of \$720 in packing charges as "Total Charges on Change Order." We do not find, on the basis of

this record, that Pacific charged shipper Coil in excess of a written estimate in violation of Item 108.

We find four violations of Item 108.

3. Change Orders for Additional Services

Staff alleges six violations of Item 120 of MAX 4, which requires a carrier to provide a change order for additional services not covered in the basis for the estimated cost of services or in the Not to Exceed Price on the agreement for moving services. Staff does not discuss these allegations beyond referring to the record for evidence regarding shippers Kolodziej, Lorencz, Shirley, Snader, Frank, and Coil as evidence of these violations.

As discussed above, the record does not support a finding that Pacific failed to provide a change order for shippers Frank and Coil.

We do not find that Pacific violated Item 120 with respect to the Kolodziej and Shirley moves. While it is a violation of the MAX 4 to charge in excess of an estimate without a change order, the fact of overcharging does not necessarily mean that a change order was required. Although Pacific charged in excess of the written estimates, nothing in the record suggests that Pacific charged for services that were not included in the estimates and that therefore required a change order. Similarly, nothing suggests that Pacific provided any services to shipper Snader beyond those previously identified and agreed to, or charged her for such extra services.

With respect to the Lorencz move, however, the evidence indicates that Pacific imposed a charge for a packing service which it did not include in its oral estimate.

We find one violation of Item 120.

4. Agreement for Moving Services

Item 128 of MAX 4 requires household goods carrier to provide a completed “Agreement for Moving Services” to shippers, and staff alleges that Pacific violated this provision three times. Staff does not discuss these allegations beyond referring generally to the record evidence regarding shippers Kolodjiez, Shirley and Snader.

Pacific’s “Combined Agreement for Moving Services and Freight Bill” for shipper Kolodjiez is in the record. Staff does not identify what required information is missing from the document. We note, however, that the agreement does not include a Not to Exceed Price as required under Item 128; we address this deficiency below with respect to Item 132.

Shipper Shirley states, with respect to financial documentation provided by Pacific, that he did not receive anything other than the written estimate discussed earlier. We conclude that Pacific failed to provide an agreement pursuant to Item 128.

Shipper Snader states, with respect to financial documentation provided by Pacific, that Pacific provided her with nothing further than a written estimate for eight to nine hours with one truck and three men at a rate of \$95 an hour. We conclude that Pacific failed to provide an agreement pursuant to Item 128.

Staff does not identify the Lorencz move as a violation of Item 128. Nevertheless, as discussed previously, the record is clear that Pacific failed to provide any written documentation of a shipping agreement to shipper Lorencz.

Accordingly, we find three violations of Item 128.

5. Not to Exceed Price

Item 132 of MAX 4 requires household goods carriers to provide a Not to Exceed Price, and staff alleges that Pacific violated this provision six times. As evidence of these violations, staff refers generally to the record for evidence regarding shippers Kolodziej, Shirley, Snader, Holeman, Smith, and Elbaum.

Based on the evidence discussed above, we find that Pacific failed to provide a Not to Exceed Price to shippers Kolodziej, Shirley, and Snader. Our review of the shipping documents for Holeman, Smith and Elbaum confirms staff's allegation that Pacific failed to provide them a Not to Exceed Price. In addition, although staff offers no explanation for omitting them from its tally of violations, it appears that Pacific likewise failed to provide a Not to Exceed Price to three other shippers (Bartilson, Glaudo, and Stover) whose shipping documents are included in the representative documents.

We find nine violations of Item 132.

G. Fine

Section 5313.5 allows the Commission to impose of fine of up to \$5,000 for each violation of the prohibition in § 5314.5 against operating or holding oneself out as a household goods carrier without a valid permit. Section 5313 allows the Commission to impose a fine of up to \$500 for all other violations of the Household Goods Carrier Act, including violations of Commission rules, regulations, and directions.

Staff recommends a fine of \$40,000, based on the Commission's guidelines for determining fines, and other Commission precedent. We conclude that a fine of \$40,000 is warranted on the facts of this case.

To provide guidance in setting fines, the Commission has distilled the principles that it has historically relied upon in assessing fines and restated them such that they may form the basis for future decisions. (Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships between Energy Utilities and Their Affiliates Adopted by the Commission in Decision 97-12-088, 84 CPUC 2d 155, 188 (D.98-12-075, App. A.) Those principles begin by stating that the purpose of fines is to deter further violations. In determining whether to impose a fine and, if so, at what level, the Commission will consider five factors, namely, the severity of the offense, the carrier's conduct, the financial resources of the carrier, the role of precedent, and the totality of circumstances in furtherance of the public interest.

Turning to the first factor, the severity of the offense includes consideration of the economic harm imposed as well as the economic benefit gained. Here, Pacific gained substantial economic benefit over the course of its operations as a household goods carrier. In addition, Pacific economically harmed (and gained unjust enrichment from) shippers by overcharging them relative to the written estimate provided. We also note the economic harm imposed on shippers by loss and damage to their property in the course of Pacific's moves, as documented by their declarations.

The next factor is the carrier's efforts to prevent, detect, and rectify the violation. In Pacific's favor, we note that Pacific obtained, at least for a period of time (albeit non-contemporaneously), cargo insurance and liability coverage as directed by Commission staff in an effort to meet the application requirements. On the other hand, Pacific disregarded staff's explicit instruction to cease and desist from operating, as well as the temporary restraining order and preliminary injunction of the Los Angeles Superior Court. Pacific also failed to

appear as ordered by this Commission to show cause why its application should not be denied. We conclude that these facts aggravate the offense.

The next factor is the financial resources of the carrier, which may mitigate a fine. Pacific failed to appear at the hearing in this matter, as ordered by the Commission, and has not presented any evidence of inability to pay fines.

The final factor is the totality of the circumstances in furtherance of the public interest. The public interest is best served by household goods carriers that comply with applicable law and regulations. Where violations do occur, prompt remedial actions are required. In contrast, the totality of the circumstances of this case includes Pacific's failure to comply with the temporary restraining order and preliminary injunction of the superior court and the Commission's order to appear and show cause. Aside from Pacific's sporadic and inadequate efforts regarding insurance, there is no evidence in the record of remedial actions, or of recognition that such action is required.

The record also shows Pacific misrepresented, in its application for a permit, that it has not committed any act constituting dishonesty or fraud, or committed a felony or crime involving moral turpitude. To the contrary, staff presented evidence that Fischer had been convicted of attempted theft (1996), trespass and occupying property without consent (1984), and grand theft (1981).

Commission precedent likewise provides guidance as to the appropriate size of a fine for Pacific's violations. For example, Decision (D.) 02-05-028, *Re Best Movers*, involved a carrier who provided service during suspension of its permit and when it did not have required insurance coverage. The Commission fined Best Movers \$19,000 (with \$14,000 suspended if the carrier complied with the decision), required restitution payments to customers for loss and damage to furniture, and imposed a three-year probationary period.

D.02-08-052, *Re Affordable Apartment Movers*, involved a carrier who provided service after suspension and revocation of its permit, failed to maintain insurance, overcharged on oral estimates, and failed to comply with a lawful order of the court. The Commission ordered restitution and fined *Affordable Apartment Movers* \$26,000 (reduced to \$6,500 upon making restitution payments).

D.01-08-035, *Re Ace of Bace Moving*, involved a carrier who, among other things, exhibited a practice of extracting unlawful additional amounts for a move by refusing to unload household goods, and a pattern of noncompliance with applicable law and regulations. The Commission ordered Ace of Bace to make reparations to customers for the unlawful charges, and fined the mover \$40,000 (reduced to \$10,000 upon making all required reparations). Pacific's violations run the gamut of the violations at issue in these cases, and outnumber them.

Pursuant to § 5313.5, the Commission may assess a fine of up to \$5,000 each time a person operates or holds itself out as a household goods moving carrier without having a valid permit. The Commission may, under § 5313, assess a fine of up to \$500 for other violations of the Household Goods Carrier Act, including any rule, regulation or direction of the Commission.

Based on its tally of violations, staff calculates that Pacific is liable for a fine of up to \$157,000. We, however, calculate the potential liability to be up to \$533,500, the difference being due to the record evidence of many more illegal operations than staff includes in its tally. The recommended fine of \$40,000 is well within the amount permitted by statute.

The fine is reasonable in that it is severe enough to properly reprimand respondents for past illegal actions, and indicates to the respondents that the Commission is serious about enforcing its rules. Accordingly, we order respondents, jointly and severally, to pay the sum of \$40,000. Prompt and

complete payment of all reparations due to former customers is a significant mitigating factor. Should Pacific make all required reparations discussed below, we will consider that in mitigation of the fine and reduce it to \$10,000.

H. Investigation Costs

Section 5313.5 provides that the Commission may assess the costs of investigation when it finds that a person or corporation has operated or held itself out as a household goods carrier without a valid permit. Staff provides evidence that the costs of this investigation totaled \$6,931.83.

Accordingly, Pacific is ordered to pay the sum of \$6,931.83.

I. Restitution

Staff recommends that the Commission order Pacific to pay all overcharge claims filed with the Commission, which it totals as \$4,425.40. Staff does not discuss the evidence, but merely refers to the Nakasone declaration and the supporting documents regarding shippers Kolodziej, Lorencz, Shirley and Snader.

We are unable to reconcile staff's figure of \$4,425.40 with the record. In addition, the referenced evidence offers no indication that shippers Lorencz, Shirley, and Snader filed claims with this Commission. We identify the following \$4015 in overcharges:

- Pacific charged shipper Kolodziej \$3,277 as compared to the estimate provided her of \$1627. Kolodziej states that she does not dispute the \$375 charge for storage. This results in an overcharge of \$1,275.
- Pacific charged shipper Lorencz \$200 in excess of the oral estimate provided him.
- Pacific charged shipper Shirley \$2,300 as compared to the written estimate of \$1,182, an overcharge of \$1,118.

- Pacific provided shipper Snader a written estimate of eight to nine hours at an hourly rate of \$95. Snader states both that Pacific charged her \$1,333.20 and that the final charge was based on 13 hours. Assuming the higher estimate of nine hours, this computes to an overcharge of either \$478.20 or \$380; due to the discrepancy in the record, we adopt the lesser figure.
- Pacific charged shipper McLaughlin \$432 in excess of the written estimate and the Not to Exceed Price.
- Pacific charged shipper Ardy \$610 in excess of the written estimate provided to her.

Staff also recommends that the Commission order Pacific to pay all court judgments based on loss and damage claims. The order instituting this investigation indicates that the Los Angeles County Superior Court has ordered Fischer to make restitution payments of \$2,137 to three victims, including \$896.98 to shipper McLaughlin and \$900 to shipper Ardy; these amounts appear to include payment for their loss and damages. Nothing in the instituting order or in the record identifies the third victim for whom restitution is ordered.

Staff does not comment with respect to other loss and damage claims in the record. Nevertheless, we identify the following losses and damages evidenced by shipper declarations:

- Pacific broke a curio cabinet, a dining room chair, and a barbeque in the move for shipper Lorencz. The items are valued at \$1,600.
- Pacific damaged a dresser and a table, and lost a set of new speakers in the move for shipper Shirley. The record does not present a value for the damaged items. The speakers are valued at \$700.
- Pacific broke an antique chair, damaged a child's chair (which it took to repair and did not return), damaged a baby crib, dented several picture frames, and scratched the floors and walls at both homes in the move for

shipper Snader. The record does not provide a value for the loss and damages.

- Pacific lost a potted ficus tree, a hand truck, and a pot, and damaged two sofas, a vacuum cleaner, and four antiques in the move for shipper Frank. The total cost of replacement, cleaning, and repairs is set at \$8,766.75. Frank received \$3,000 from his personal insurance carrier, and claims the balance of \$5,766.75.
- Pacific lost two couches and a mattress, and damaged a refrigerator, a computer desk, and a glass end table in the move for shipper Coil. Pacific agreed to pay compensation of \$945 in three installments, but stopped payments after the first installment of \$300.

To summarize, we identify \$2,973 due to shippers Kolodziej, Lorencz, Shirley, and Snader in restitution for overcharges; \$8,711.75 due to shippers Lorencz, Shirley, Frank, and Coil for loss and damages; and restitution, ordered by the Los Angeles County Superior Court, due to shippers McLaughlin and Ardy in the amounts of \$896.98 and \$900,⁷ respectively. Consistent with Commission precedent, and in order to encourage compliance with this restitution order, we will treat prompt and complete restitution to all customers as a significant mitigating factor. Should Pacific make all required restitution, we will reduce the fine to \$10,000.

J. Prejudicial Denial of Application

Section 5135(f) provides:

The Commission shall issue a [household goods carrier] permit only to those applicants who it finds have demonstrated that they possess sufficient knowledge,

⁷ The instituting order also states that Ardy has opted for a \$5,000 small claims judgment. To the extent that Fischer complies with the small claims judgment, we excuse respondents' compliance with the Los Angeles Superior Court Order.

ability, integrity and financial resources and responsibility to perform the service within the scope of the application.

Staff asserts that Pacific is unfit under § 5135(f) by virtue of having repeatedly flouted the Commission's authority by operating illegally, by failing to disclose Fischer's prior criminal convictions as required in the application, and by not refunding overcharges to customers. Staff recommends that the Commission deny Pacific's pending application with prejudice.

We deny Pacific's pending application, and we do so with prejudice. Our decision, however, is compelled not only by Pacific's failure to disclose its prior criminal convictions, illegal operations, and its other violations. Although they are serious violations, they do not categorically foreclose the possibility of demonstrating fitness in the future. Rather, our decision is compelled by the aggravating fact of Pacific's failure to appear, to respond to the charges, and to demonstrate a willingness to submit to the Commission's resolution of this investigation.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge (ALJ) in this proceeding.

Need for Hearing

As respondents failed to appear or to present disputed issues of material fact, we conclude that hearings are not necessary. Accordingly, as provided in Rule 6.6 of the Commission's Rules of Practice and Procedure, Article 2.5 of those Rules ceases to apply to this proceeding. However, the *ex parte* communication prohibition found in Rule 7(b) shall continue to apply.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice

and Procedure. Comments were filed by CPSD on April 19, 2005; no other comments were filed. We have received the comments, and taken them into account, as appropriate, in finalizing this decision.

Findings of Fact

1. Pacific has conducted operations or attempted to conduct operations as a household goods carrier without a permit on at least 99 occasions.
2. Pacific has advertised as a household goods carrier without holding valid Commission authorization.
3. Pacific has conducted at least 14 household goods moves without liability protection.
4. Pacific has conducted at least 10 household goods moves without cargo insurance.
5. Pacific has failed to provide shipper information booklets to customers on two occasions.
6. Pacific has charged customers in excess of a written estimate or, in the absence of a shipping agreement, in excess of an oral estimate or labor quote, on four occasions.
7. Pacific has failed to issue an Agreement for Moving Services on three occasions.
8. Pacific failed to provide a Not to Exceed Price on at least nine occasions.
9. Pacific has shown a pattern of noncompliance with the law and Commission directives, particularly in operating without a valid permit and in violation of a temporary restraining order and preliminary injunction, in overcharging customers and failing to compensate them for loss and damage to their property, and in failing to failing to maintain cargo and liability insurance coverage.

10. Pacific overcharged shippers Kolodjiez, Lorencz, Shirley, and Snader \$1275, \$200, \$1118, and \$380, respectively, in excess of written estimates and, where it failed to provide a written estimate or a shipping agreement, in excess of oral estimates and labor quotes.

11. Pacific caused loss and damage to the property of shippers Lorencz, Shirley, Frank, and Coil in the amount of \$1,600, \$700, \$8,766.75 (of which \$3,000 was paid by the shipper's insurer), and \$945 (of which Pacific has paid \$300).

12. The Los Angeles Superior Court ordered Pacific to pay restitution to shippers McLaughlin and Ardy, for overcharges and loss or damage to their property, in the amount of \$896.98 and \$900, respectively.

13. Pacific has failed to appear in this investigation or to present any disputed issues of material fact.

14. The Commission incurred \$6,931.83 in costs by investigating this matter.

Conclusions of Law

1. Pacific violated Pub. Util. Code § 5133 at least 102 times by conducting or attempting to conduct household goods carrier operations without a Commission permit in force.

2. Pacific violated Pub. Util. Code § 5313.5 at least six times by advertising as a household goods carrier without a valid permit.

3. Pacific violated Pub. Util. Code § 5161 on 24 occasions by conducting household goods carrier operations without liability protection or cargo insurance.

4. Pacific violated the Commission's Maximum Rate Tariff 4 at least 17 times.

5. Pacific should be fined \$40,000, to be paid to the Commission for deposit in the General Fund of the State of California.

6. Pacific should pay to the Commission \$6,931.83 for the costs of investigating this matter.

7. Pacific should promptly pay in full the outstanding Los Angeles Superior Court judgment due to shippers McLaughlin and Ardy, and provide proof of payment of this judgment to CPSD, no later than 60 days from the effective date of this decision.

8. Pacific should promptly pay in full restitution for overcharges and loss and damage to property to shippers Lorencz, Shirley, Frank, and Coil in the amount of \$8,711.75 as described in this decision, and provide proof of payment to CPSD, no later than 60 days from the effective date of this decision.

9. Should Pacific make full and prompt restitution to customers, the Commission should stay all but \$10,000 of the \$40,000 fine.

10. Hearings are not necessary.

O R D E R

IT IS ORDERED that:

1. Pacific Coast Moving & Storage, Inc., Warner Lee Fischer, and Philip Edward Dresser, Jr., jointly and severally, are fined \$40,000, with all but \$10,000 suspended provided they timely comply with the restitution orders in Ordering Paragraph 3. Respondents shall pay the \$10,000 portion of the fine no later than 60 days after the effective date of this decision. Payment shall be made payable to the California Public Utilities Commission for deposit to the General Fund, and remitted to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. The number of this decision shall be included on the face of the check.

2. Pacific Coast Moving & Storage, Inc., Warner Lee Fischer, and Philip Edward Dresser, Jr., jointly and severally, are charged \$6,931.83 for the cost of

this investigation. Payment shall be made payable to the California Public Utilities Commission and remitted to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102. The number of this decision shall be included on the face of the check.

3. Pacific Coast Moving & Storage, Inc., Warner Lee Fischer, and Philip Edward Dresser, Jr., jointly and severally, shall pay in full the outstanding court judgments for McLaughlin and Ardy, and the restitution identified in this decision with respect to Kolodjiez, Lorencz, Shirley, Snader, Frank and Coil that have not been previously paid by either respondents or an insurer, no later than 60 days from the effective date of this decision. Respondents shall provide proof of payment, no later than 60 days from the effective date of this decision, to William G. Waldorf, California Public Utilities Commission, Supervisor, Consumer Service Division, 505 Van Ness Avenue, San Francisco, California 94102.

4. If respondents fail to timely comply with Ordering Paragraph 3, the suspended portion of the fine (\$30,000) and the cost of investigation (\$6,931.83) shall become due and payable immediately.

5. The pending application of Pacific Coast Moving & Storage, Inc. for household goods carrier permit is denied.

6. Any future application for household goods carrier permit by Pacific Coast Moving & Storage, Inc., Warner Lee Fischer, or Philip Edward Dresser, Jr. shall be denied.

7. The General Counsel shall take all reasonable and lawful actions, as authorized under the Pub. Util. Code or otherwise, to enforce this decision, including the collection of all amounts due and payable from respondents or any of them.

8. Investigation 04-08-021 is closed.

This order is effective today.

Dated _____, at San Francisco, California.